IN THE HIGH COURT OF JUDIATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.252 OF 2005

Haider Ali
an Indian Inhabitant
residing at A-10,
Admant Compound,
Khairani Road, Saki Naka
Andheri (East),
Mumbai 400 072 .. Petitioner.
(Brother-in-law
of the detenue)

Versus

1. State of Maharashtra
Through the Secretary to
the Govt. of Maharashtra,
Home Department, Mantralaya,
Mumbai 400 032. ..
Respondent.

2. Neela Satyanarayana
The Principal Secretary to the
Government of Maharashtra
Home Department
(Appeals and Security)
and Detaining Authority,
Mantralaya,
Mumbai 400 032. ..

3. The Superintendent of
Prison,
The Mumbai Central Prison,
Arthur Road, Mumbai ..

4. The Superintendent of
Prison,
Nasik Road Central Prison,
Nasik. .. Respondents.

Shri Maqsood Khan for the petitioner.

Shri S.R.Borulkar P.P. for the respondents.

CORAM : SMT.RANJANA DESAI
& D.B.BHOSALE, JJ.

DATED : 13TH JUNE, 2005

JUDGMENT: (PER D.B.BHOSALE, J.)

1. This writ petition under Article 226 of the Constitution of India is directed against the order of detention dated 27.11.2003 issued by Neela Satyanarayana, Principal Secretary, (Appeals and Security), Government of Maharashtra (for short "the detaining authority") under section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short, "the COFEPOSA Act") by which Abdulla Gulam Mustafa, hereinafter referred to as "the detenu", has been detained with a view to prevent him in future from smuggling of goods. The petition is filed by the brother-in-law of the detenu.

2. The factual matrix that would be relevant and material for deciding the instant criminal writ petition is as follows: On 14.2.2003 at Sahara International Airport, Mumbai the detenu was frisked and in his hand baggage Indian currency of Rs.47 lakhs and the foreign currency, equivalent to Indian Rs.21,65,384.60 was found. In further investigation it transpired that the detenu was

carrying the said currency on the instructions of one Sanjay Agarwal for handing it over to one Sai Kumar, who in turn was to take it out of India i.e. to Singapore. The detenu had an air ticket of Hyderabad and admittedly he was to travel by International flight. It appears that the currencies found with the detenu was not declared by him to the customs. On completion of the investigation in the case, the Joint Commissioner of Customs, Air Intelligence Unit issued a show cause notice on 7.8.2003. It was placed before the detaining authority alongwith the other material relied upon for passing the impugned order. The order of detention was, accordingly, issued on 27.11.2003. Since the detenu was absconding and was arrested on 25.6.2004 it could not be executed till then.

3. The allegations as reflected in the grounds of detention, in short, are that the detenu was found in possession of the currency, as stated above, which he had not declared to the customs while undergoing the formalities for travelling by International flight from Bombay to Hyderabad. In his statement recorded under section 108 of the Customs Act, 1962 he, interalia, admitted recovery

of the currency. According to the detenu the currency was given to him by one Sanjay Agarwal, for whom he was working at the relevant time, for handing it over to Sai Kumar. The detenu was also found in possession of a photocopy of the passport of Asad Khan with his photograph super imposed on it. That according to the detenu was done by Sanjay Agarwal. He was also found in possession of mobile phone on which just before his arrest the calls from the mobile phone belonging to Sanjay Agarwal had been received. Even the air ticket on which the detenu was to travel was also issued in the name of Asad Khan. When the detenu was intercepted by the Air Intelligence Unit he confirmed his name as Abdulla Shaikh Mehmood. In his further statement recorded under section 108 of the Customs Act, he has admitted that he was aware about the contents of the bag in which the currency was found and that bag was given at Hotel Bawa by Sanjay Agarwal in the presence of Sai Kumar, who was expected to meet him at the transit lounge of the International Airport for carrying it further to Singapore. He also admitted that air ticket which he was possessing was issued in the name of Asad Khan and he was told to disclose his name as Asad Khan on being enquired at the airport. He

also admitted that a photocopy of the passport of Asad Khan showing detenu's photograph was given by Sanjay Agarwal and that he was told to handover the bag containing currency to Sai Kumar in transit lounge after Sai Kumar's clearance through immigration and customs. It appears that since Sai Kumar did not turn up and there was short time left for departure of the flight by which the detenu was to travel, he was instructed by Sanjay Agarwal to handover the bag containing currency to one Mr.Deepak working in Maharaja Lounge in transit area. However, before he could do so he was asked to rush to the security hold, where bag of the detenu was X-rayed, resulting in recovery of the currency.

4. We heard the learned counsel appearing for the parties at great length. Perused the petition and its annexures as also reply affidavits filed by the detaining authority, the Joint Commissioner of Customs and the Under Secretary to the Government of Maharashtra. Mr.Khan, learned counsel for the petitioner assailed the order of detention on the following grounds: He took us through paragraphs 16, 18, 25, 26, 34 and 38 of the show cause notice

dated 7.8.2003 and urged that it clearly demonstrates that the key person and master mind behind the alleged smuggling activity was Sanjay Agarwal. The detenu was just a servant of Sanjay Agarwal, who was carrying out the order of his master. He further submitted that there is absolutely no material of whatsoever nature which would indicate that the detenu was carrying out activities as specified in section 3(1) of the COFEPOSA Act. It was further submitted that the detention order was also issued against Sanjay Agarwal on 27.11.2003 and that order had been revoked by the detaining authority under section 21 of the General Clauses Act, 1897 on 19.3.2004. Therefore, it was incumbent on the part of the detaining authority to revoke the order of detention against the detenu also. In other words, he submitted that continuance of the impugned order of detention against the detenu is blatant violation of the Article 14 of the Constitution of India which guarantees equal status in the eyes of law to every citizen. In short, according to Mr.Khan, the order of detention against the detenu is discriminative, malafide and illegal. Mr.Khan next contended that looking to the role played by the detenu, in any case it would not amount to

smuggling. The alleged role of the detenu was confined only to handing over the currency to Sai Kumar in the transit lounge of the Airport. The detenu was not to carry the said currency out of India to a place outside India. He further submitted that the detenu did not have an air ticket to travel out of India. Therefore, according to Mr.Khan, the passenger possessing goods specified in sections 111 or 113 which are liable to confiscation, if travelling to a domestic destination by international flight would not amount to smuggling of goods. The impugned order, according to Mr.Khan indicates total non-application of mind. Lastly, he contended that assuming that by some mechanism, the alleged act of the detenu falls within the parameters of section 3(1) of the COFEPOSA Act, it would at the most amount to "abetting the smuggling of goods" and not "smuggling of goods" since he was to only handover currencies to Sai Kumar, who in turn was to take it out of India. His role was only to facilitate main act of smuggling and, therefore, the impugned order of detention, as issued, is without application of mind and illegal. Mr.Khan, in support of his contentions urged, relied upon judgments of the Apex Court in **Narendra Purshottam Umrao V.**

B.B.Gujral and Others AIR 1979 Supreme Court 420, unreported judgment in Pawan Bhartiya V. Union of India & Anr. delivered on 31.10.2001 in Criminal Appeal No.1104 of 2001 and the judgment of Delhi High Court in **Dilbagh Singh and etc. V. Union of India and Others 1989 Cri.L.J.2527**.

5. On the other hand Mr.Borulkar, P.P. invited our attention to the provisions of the COFEPOSA Act and relevant provisions of the Customs Act to contend that the act of the detenu squarely falls within meaning of "smuggling" as defined under section 2 (39) of the Customs Act and, therefore, the submission of Mr.Khan that the act of the detenu would at the most amount to "abetting the smuggling of goods" deserves to be rejected outright. He took us through detention order to demonstrate how the acts of the detenu amount to smuggling of goods and they are covered under clause (i) of sub-section 1 of section 3 of the COFEPOSA Act. He further submitted that the judgments relied upon by the detenu would not be applicable to the facts of the present case. Mr.Borulkar in reply to the first contention urged by Mr.Khan, learned counsel for the detenu submitted that it is open for the court to come to

a particular conclusion upon the facts of a given case, and it need not quash the order of detention merely on the ground that detention order of the co-detenu had earlier been revoked. In support of this contention he placed reliance upon the judgment of the Division Bench of this Court in **Kavita Ramesh Gada V. State of Maharashtra & Others** (to which one of us Smt.Ranjana Desai, J. was party) delivered on 5th July, 2004 in Criminal Writ Petition No.1741 of 2003. He also placed reliance upon the judgment of **Yogendra Murari V. State of U.P. and Others AIR 1988 Supreme Court 1835**.

6. Section 3 of the COFEPOSA Act provides for the power to make orders detaining certain persons. Under this provision, the detaining authority, specially empowered, may, if satisfied, with respect to any person (including a foreigner) make an order directing such person be detained with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange or with a view to preventing him from (i) smuggling goods, or (ii) abetting the smuggling of goods, or (iii) engaging in

transporting or concealing or keeping smuggled goods, or (iv) dealing in smuggled goods otherwise than by engaging in transporting or concealing or keeping smuggled goods, or (v) harbouring persons engaged in smuggling goods or in abetting the smuggling of goods. It is thus clear that the detaining authority is empowered to make an order of detention on any of the grounds specified in sub-section (1) of section 3. In the present case, we are concerned with ground (i) of sub-section (1) of section 3. The order of detention and the grounds clearly state that the detenu had been knowingly involved in smuggling of the goods and the detaining authority having been subjectively satisfied that the detenu would continue to engage in prejudicial activities, as alleged, in future also came to a conclusion that it was necessary to detain him under the COFEPOSA Act with a view to prevent him in future from "smuggling goods".

6.1. Clause (e) of section 2 of the COFEPOSA Act which defines smuggling says that it has the same meaning as in clause (39) of section 2 of the Customs Act and all its grammatical variations and cognate expressions. Clause (39) of section 2 of

the Customs Act defines "Smuggling" which read thus:

> "2(39) "Smuggling", in relation to any goods, means any act or omission which will render such goods liable to confiscation under section 111 or section 113".

6.2 Section 111 of the Customs Act provides for the list of imported goods liable to confiscation while section 113 provides for confiscation of goods attempted to be improperly exported. In the present case, we are concerned with section 113 since the allegation against the detenu was that he was found in possession of the currency which was not declared and which was to be exported out of India and hence liable for confiscation. The clauses (a) to (l) of section 113 specify the list of export goods which are liable to confiscation. Clause (a) of section 113 with which we are concerned reads thus:

> "113. Confiscation of goods attempted to be improperly exported etc-- The following export goods shall be liable to confiscation:--
>
> (a) any goods attempted to be exported by sea or air from any place other than a customs port or a customs airport appointed for the loading of such goods".

6.3 The expression "export goods" has also been defined in clause (19) of section 2 of the Customs Act. Clause 19 of section 2 reads thus:

> "(19) "export goods" means any goods which are to be taken out of India to a place outside India".

The word "export" has also been defined in clause 18 which reads thus:

> "(18) "export", with its grammatical variations and cognate expressions means taking out of India to a place outside India".

6.4 A plain reading of the word "export" means to send (goods) out of one country for sell or use in another. The expression "export goods" means any goods, mentioned in clauses (a) to (l) are liable to confiscation because they are attempted to be improperly exported. Clause 22 of section 2 of the Customs Act defines "goods" which also includes "currency". A plain reading of section 113 and the definition of words "export", "export goods" and "goods" and the definition of smuggling under section 2(39) of the COFEPOSA Act would show that even an attempt made by a person to improperly

export goods as specified in clause (a) to (l) of section 113 would be covered by section 3(1)(i) of the COFEPOSA and for that purposes it is not necessary that a person making such attempt needs to personally undertake the task of taking such goods out of India to a place outside India. In other words, a person actively involved in an attempt to take any goods, which are liable to confiscation, out of India are also covered by the definition of "smuggling goods" as specified in clause (i) of sub-section 1 of section 3 of the COFEPOSA Act. The submission, therefore, that the person found in possession of the goods liable to confiscation was not to travel to a place outside India, where the currency was to be taken by some other person, cannot be said to have been involved in smuggling of goods must fail.

7. In the present case the fact that the detenu was found in possession of huge Indian and Foreign currency which he had not declared to the Customs coupled with other facts such as carrying photocopy of the passport of Asad Khan with his photograph super imposed in the place of Asad Khan and the telephone calls made and received on the mobile at the relevant time and the conduct of the

detenu before and after the alleged incident, that took place at the Airport, clearly indicate that the detenu was actively involved in smuggling of goods. In our opinion, the acts of the detenu clearly amount to smuggling of goods as specified in clause (i) of sub-section 1 of section 3 of the COFEPOSA Act and, therefore, by no stretch of imagination it could be said that the detenu was not involved in smuggling of goods merely because he had no ticket to travel to a place outside India. The submission of Mr.Khan that action taken by the detaining authority against the detenu for preventing him from smuggling of goods indicates total non application of mind, therefore, fails and deserves to be rejected outright. Keeping in view the overall facts and circumstances of the present case it cannot be said that the acts of detenu would amount to "abetting the smuggling of goods" and not "smuggling of the goods".

8. This takes us to consider the other limb of the argument advanced by Mr.Khan, learned counsel for the petitioner that the detaining authority has acted malafide and has violated detenu’s fundamental right under Article 14 of the Constitution of India. In this regard heavy

reliance was placed by Mr.Borulkar, learned P.P. on the judgment of **Kavita Ramesh Gada** (supra). He submitted that similar arguments were advanced, incidentally by Mr.Khan, who was appearing in that petition also for the petitioner, and while dealing with same this Court has rejected his contention. We perused the judgment in **Kavita Ramesh Gada's** case (supra) and found, even on facts, that there is similarity and almost identical submissions were advanced by Mr.Khan in that case. Several judgments of the Apex Court as also of this court were considered in that case to hold "that each case has to be judged with reference to its own peculiar facts. What is material is not merely the role of the person but also reasonable apprehension as to his future conduct and this reasonable apprehension would depend upon the relevant facts and circumstances of the case which differ from individual to individual". It was, therefore, observed that "if the order of detention of a person is revoked, co-detenu's order cannot be set aside by the High Court on that ground". In so far as the present case is concerned, in our opinion, the role of the detenu is different and serious. It is clear from the facts as disclosed in the order of detention and the grounds that the detenu

played active role in smuggling of the goods and he was found in possession of huge currencies Indian as well as foreign, which he attempted to export improperly out of India. We do not know on what grounds and what prompted the detaining authority to revoke the order of detention issued against Sanjay Agarwal. Though we have our reservation about the correctness and legality of the order by which the detention order of Sanjay Agarwal had been revoked, in any case, in our opinion, the detenu cannot be given benefit of such order of revocation on the spacious ground of violation of Article 14 of the Constitution of India. We are satisfied that the order of detention passed against the detenu is proper and deserves to be confirmed by dismissing this writ petition. Moreover, we are not expected to enter the arena of the subjective satisfaction of the detaining authority while considering the challenge to the detention order. The satisfaction of the detaining authority that the detenu has great propensity to indulge in similar prejudicial activities, in future, appears proper to us. Furthermore, the apparent distinction between the role played by Sanjay Agarwal and the present detenu has persuaded us not to accept the submission that the State

Government ought not to have discriminated while confirming the detention order. The law is well settled that it is open for us to come to particular conclusion upon the facts of the given case. Therefore, the submission of Mr.Khan that the order of detention deserves to be quashed on the ground of discrimination fails. The judgment of the Apex Court in **Pawan Bhartiya's case** (supra) relied upon by Mr.Khan would not be applicable to the facts of the present case. In that case, it is apparent that nature of the allegations and role attributed to the detenu was identical with the co-detenu whose orders of detention had been revoked by the Central Government. The relevant observations in the judgment of the Apex Court in Pawan Bhartiya's case read thus :

> ...."In response to the contention raised by the appellant the detaining authority - Joint Secretary to the Govt. of India, Ministry of Finance, Department of Revenue, Central Economic Intelligence Bureau has filed an affidavit wherein it is admitted that similar five detention orders were revoked. However, it is stated that at the relevant time when the detention orders with regard to the other persons were revoked, the perception of the Central Government was, the fact of payment of duty in the cases detected against these persons may act as a deterrent against their chance of indulging

> in similar prejudicial activities in future since this may adversely affect their financial backbone. Following the said line of thinking Central Government had revoked the detention orders issued against those five persons. However, subsequently that perception was changed and according to the view of the detaining authority there was no necessity of reviewing the detention order before its execution".

8.1 It is against this backdrop that the Apex Court observed that there was no reason to discriminate the appellant and the reasons given by the authority in not revoking the detention order would hardly be justified. Even the judgment of Delhi High Court in **Dilbagh Singh's case** (supra) would not be applicable. In that case the detenus were driver and cleaner of the truck from which foreign marked gold biscuits were recovered and who had obeyed the directions of their masters in helping him in concealing the said gold in the cavity of the door of the truck and transporting the said smuggled goods in the said truck. It was, held that the detaining authority could not have reached the subjective satisfaction in absence of any material that the detenus were likely to repeat prejudicial activity if they are not detained and consequently the detention orders were quashed. In the present case, the detaining authority after

considering the entire material recorded its satisfaction that unless the detenu is detained he is likely to engage in the smuggling activity in future also and, therefore, it was necessary to detain him under the COFEPOSA Act with a view to prevent him in future from smuggling goods. From the nature of the allegations it is clear that the detenu had knowingly involved in smuggling activity and had played very active role in an attempt to improperly export the currency which was liable for confiscation.

9. Thus, from the facts discussed above it turns out that there was sufficient material which leads to reasonable and definite conclusion that the detenu was involved in smuggling goods and, therefore, the detaining authority found it necessary to detain him with a view to prevent him from smuggling goods in future and, therefore, passed the impugned order of detention against the detenu. In the result, this petition fails and is dismissed as such.

10. Before we part with this case, we must refer to a vital aspect of the matter. As we have already mentioned, the order of detention issued

against Sanjay Agarwal is revoked by the detaining authority. We have referred to another case where the State had passed similar order. While we do not want to trench upon the State Government's powers to revoke the orders of detention, we must expess our concern about the grievance made before us that in a number of cases, the State Government has revoked the orders of detention issued against the main person involved in the prejudicial activities. Undoubtedly, it is for the State to decide which orders it wants to revoke. But if the grievance made before us is true, it must be looked into because this trend can have serious repercussions. We do not understand how the orders issued against the co-detenues; who play a comparatively lesser role in the prejudicial activities are sought to be vigorously defended in the court while the kingpins are allowed to go scot-free. We hope that the authorities will look into this disturbing aspect. We direct that a copy of this judgment be forwarded to the Law Minister, Government of Maharashtra; the Chief Secretary, Government of Maharashtra; the Secretary, Law & Judiciary; and to the Principal Secretary (Appeals and Security), Government of Maharashtra.

(SMT.RANJANA DESAI, J.)

(D.B.BHOSALE, J.)

HIGH COURT AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL NO.WRIT PETITION NO.252 OF 2005

Date of Decision: 13th June, 2005.

For approval and signature:

The Hon'ble Smt. Justice : Ranjana Desai

And

The Hon'ble Mr.Justice : D.B. Bhosale

1. Whether Reporters of Local papers may be allowed to see the judgement ?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges?

6. Whether the case involves an important question of law and whether a copy of the judgment should be sent to Nagpur Office?

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CRIMINAL WRIT PETITION NO.252 OF 2005

(Haider Ali Vs. State of Maharashtra & Others)

Office Notes, Office Memoranda of coram, appearances, Court's orders or directions and Registrar's orders.	Court's or Judge's orders.

CORAM : SMT.RANJANA DESAI &
D.B.BHOSALE, JJ.

DATED: 13TH JUNE, 2005.

P.C.:

. For the reasons separately recorded in the judgment, the court dismisses the writ petition and discharges the rule.

For Registrar